IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

CRL.REV.PET.NO. 4477 of 2006()

CRA.98/2001 of ADDL. SESSIONS COURT (ADHOC) II, KASARAGOD
SC.144/1999 of ASSISTANT SESSIONS COURT, HOSDRUG

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REVN. PETITIONER:

MANI MADAVALAPPIL, S/O.LATE V.V.KUNHIKKANNAN,
AGED 38 YEARS, CHALIL HOUSE,
MAYICHA, CHERUVATHUR, KASARAGOD DISTRICT.

BY ADV. SRI.M.SANTHOSHKUMAR

RESPONDENT:

C.I. OF POLICE, NELWASHAWAR IN CR.NO.217/97 OF
CHANDRA POLICE STATION, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. C.K.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

Crl.R.P. No.4477 of 2006

Dated this 21st day of December, 2006.

ORDER

Will an appeal filed against the conviction and sentence, which includes fine also, abate on death of appellant, if no legal heir obtains leave of court to continue appeal? This short question is to be answered in this revision.

2. This revision is filed by the son of the deceased accused. The accused was convicted and sentenced by learned Assistant Sessions Judge for offence under section 354 of the Indian Penal Code to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs.30,000/- and in default of payment of fine, to suffer simple imprisonment for a period of four months. It was also ordered that, on payment of fine by the accused, Rs.25,000/- shall be paid to PW8, the victim.

3. The deceased-accused was originally charge-sheeted for offence under section 511 of 376 and 377 of Indian Penal Code on the allegation that such offences were committed against PW8. After trial, on an analysis of the evidence adduced in the case, the trial court found the accused guilty of offence under section 354 of IPC and convicted and sentenced him under the said section. An appeal was filed before Sessions Court against the conviction and sentence. On a representation made that

appellant expired on 26.6.2005, as evidenced by the death certificate also, learned Additional Sessions Judge held that the appeal abated.

4. Learned counsel appearing for the revision petitioner, submitted that the appeal does not abate in this case, in view of section 394(2) of the Code of Criminal Procedure ('the Code' for short). It was strongly contended that the court is bound to dispose of appeal on merit and not dismiss the appeal as abated. A reading of section 394 shows that every appeal filed under section 377 or 378 shall finally abate on the death of the accused, except an appeal from a sentence of fine.

5. Learned Public Prosecutor, however, argued that by virtue of sub-section (2) of section 394, if appellant dies during pendency of appeal, if the near relative or relatives of the appellant do not apply to appellate court for leave to continue the appeal within 30 days of the death of the appellant, the appeal shall abate unless leave is granted by court to continue appeal. The proviso to sub-section (2) of section 394 reveals that where an appeal is filed against conviction and sentence of imprisonment and the appellant dies during the pendency of the appeal any of his near relatives may, within 30 days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate. Therefore, it may apparently appear that unless application is filed by the near relatives and leave is granted as stipulated in the proviso, the appeal shall abate, it is argued.

6. To appreciate the contention raised, it is necessary to read section 394 of the Code. I shall extract section 394 of the Code as hereunder:

> **"394. Abatement of appeals.--** (1) Every appeal under section 377 or section 378 shall finally abte on the death of the accused.
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally bate on the death of the appellant.
>
> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives, may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate."

7. A close reading of the proviso to sub-section (2) of section 394 shows that the said provision applies only in cases where the sentence is of imprisonment alone. It is only in cases in which the sentence imposed is of imprisonment alone that the appeal shall finally abate on the death of the appellant in the absence of the near relatives of the appellant availing of the benefit under the proviso to section 394(2). However, in cases where there is sentence of fine, appeal shall not abate on death of appellant whether the near relatives apply for leave to continue appeal or not. The proviso to section 394(2) applies only in cases where there is sentence of imprisonment alone. If the sentence is of fine or the sentence is of imprisonment and fine, appeal shall not abate on the death of appellant, even if the near relatives do not apply for leave under the proviso to section 394(2) of the Code. Therefore, the appellate court

is bound to dispose of on merit appeals filed against sentence of fine. Such appeals shall not abate on death of appellant, irrespective of whether the legal heirs apply for leave or not under the proviso to section 394(2). The order passed by lower appellate court that the appeal abated on the death of appellant is therefore, unsustainable, since sentence imposed in this case includes fine also.

8. I gain support from the dictum laid down in the decision reported in **State of Andhra Pradesh** v. **Narasimha Kumar** [2006 (3) KLT 505], which was cited by learned counsel for petitioner. The relevant portion from the said decision can be extracted herein:

> " It t is true that an appeal from a composite order of sentence is ordinarily directed against both the substantive imprisonment and the fine. But, such an appeal does not for that reason cease to be an appeal from a sentence of fine. It is something more not less than an appeal from a sentence of fine only and it is significant that the parenthetical clause of S.431 does not contain the word "only". . . . . Whether or not the sentence of fine is combined with any other sentence can make no difference to the application of that principle."

9. On going through the dictum laid down in the said decision, it is clear that only in cases where there is an appeal from imprisonment alone that the appeal will stand finally abated. In cases where fine is imposed, appeal will not abate on the death of appellant.

10. It was pointed out that this revision is filed by son of the appellant and no application is filed by him for grant of leave to

continue the proceedings. Learned counsel appearing for revision petitioner, submitted that this court can exercise power under section 397 of the Code suo motu, to correct an illegality. Hence, I make it clear that I have exercised only the suo motu power under section 397 of the Code, since the illegality pointed out by appellant's son is a glaring one and it deserves to be corrected by exercising revisional powers. However, this will not stand in the way of revision petitioner approaching lower appellate court to seek appropriate order to continue the appeal, if so advised. Whether such application is filed or not, the appeal shall be disposed of by the lower appellate court, only on merit.

In the result, the order under challenge is set aside. The lower appellate court is directed to take the appeal on file and dispose of the same, in accordance with law.

This revision is allowed.

Sd/-

K. HEMA, JUDGE.

Krs.